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MASSACHUSETTS LEGISLATION REGARDING CAPITALIZATION OF PUBLIC SERVICE COMPANIES.

The elaborate opinion by Hammond, J., of the Supreme Judicial Court of Massachusetts in the case of Fall River Gas Works Co. v. Board of Gas and Electric Light Companies, 102 N. E. 475, and especially the review therein of statutes beginning with 1830 and extending down to 1894, makes one pause to reflect upon the multitudinous discussion there has been about preventing stock watering, while this state was actually preventing it.

Think how old in the face of this discussion seems this state's last enactment, and then read this opinion and see how it seems to answer what theorists demand and how the just rights of investors in public service companies are protected.

The court tells how in the course of legislation "considerable restraint was imposed upon the issue of additional stock by public service corporations, to the end that there should be no stock watering and the public should not be correspondingly burdened, still up to 1894, there does not seem to have been any provision for any general supervision by a public board over the propriety or necessity of the issue."

By this we learn, taking the dates of prior statutes into view, that for three generations at least, in the land of steady habits, legislative declaration has enjoined their observance upon corporate creations enjoying franchises granted supposably for the public weal. And nearly a generation ago this state learned that their self-executing force left something to be desired. They needed a staff to lean upon, or, may we say an officer to make them "move on."

In the case before the court we find there was a gas works company with a charter extending back (how far is not disclosed) of June 30, 1904, on which day there is reference made to the beginning of expenditures for additions to its plant. Its history is traced to the end of 1911. A prosperous history it was, with dividends first at the rate of 10 per cent and then at 12, with extra dividends, one of 20 and another of 15 per cent, occurring in this era, new stock at $185 per share to pay for additions to plant being authorized by a board of supervision appointed under the Act of 1894.

Now the company applies to the board for another issue of 1150 shares of the par value of $100 at a price of $225 per share to make further additions to the plant. This application the board dismisses and by *certiorari* the court reviews this dismissal. The opinion illustrates the situation and shows upon what basis a court will act in review of action by such a board.

The court concedes that the statute intended to vest in the board the right to determine the reasonable necessity of any issue of additional stock, saying: "Its decision is final, unless based upon some error of law."

The opinion further says: "In acting upon an application the board is engaged in the performance of a quasi judicial function and should be moved only by considerations logical to the issue and not inconsistent with the rights of parties." As to the duty of the public service corporation, it was said: "It is its duty to have its plant large enough to perform the service for which it was established and it has a corresponding right to have such plant fairly capitalized. It is its duty to keep up the plant, whether by repairs or otherwise, out of its earnings, and this duty is superior to its right to distribute its earnings in dividends."

Getting down to the particular reason for the board's dismissal of the application, viz.: "There is every reason to believe that the company's income will afford ample provision, in addition to its regular dividends for the plant additions proposed and render a new issue of stock unnecessary for that purpose," the court said, in effect, that

it was no reason for refusing the increase of stock asked for that these undivided profits on hand or that the dividends to be afterwards earned could pay for the additions. The question was whether "the sum (to be) raised goes to increase the value of the plant for the purposes of the business for which the petitioner was incorporated."

This opinion enforces the rule that the management of a public service company is not at all committed to a board, whose duty it is to prevent overcapitalization. It cannot compel the building up of a surplus or interfere with its distribution after it is built up, if a plant is retaining its integrity, by all proper repairs and continues sufficient to perform the service for which it was intended.

And when there is a duty to meet expanding needs of service, by increasing efficiency, the right of the corporation to distribute dividends should not be interfered with, but the duty of the board is to say whether the increase asked for will leave the corporation, after that increase is properly expended, upon a safe capitalization.

There is abundant here for wise discretion by disinterested experts between the public and its franchised servant, shareholder's rights duly considered, and the opinion shows all of this in a clear and forceful way. That supervision by a public board encourages, rather than discourages, investment in public utilities the history revealed in this case seems to show.

NOTES OF IMPORTANT DECISIONS

PERPETUITIES—OPTION INDEFINITE AS TO TIME OF EXERCISE.—In the Court of Common Pleas for Fayette County, Pennsylvania, a decision said to affect "millions of dollars worth of property throughout the coal and coke regions" of Pennsylvania and West Virginia, was rendered in a case entitled, Barton et al. v. Thaw et al. The opinion in the case is published in The Morning Herald, of Union Town, Pa., and hardly will appear in any reporter system.

The reason of its wide importance in the states mentioned may also exist elsewhere, because of the reservations in favor of purchasers of mineral rights so far as surface is concerned. The form of the reservation in the case stated was an option by the purchaser of coal and minerals underlying the surface to purchase "at any future time whatsoever" he should desire the surface not exceeding a certain maximum per acre.

This character of option was held to convey an interest in the surface amounting to a suspension of alienation beyond a possible period offending the rule against perpetuities and, therefore, void ab initio. Therefore the suit by the heirs of the original grantor to cancel his conveyance in this respect as a cloud upon title eventuated in a decree to that effect.

The opinion in the case is an admirable discussion of the perpetuities doctrine as constituting part of the body of the common law inherited by us as colonists, and which finds some acceptance in statutes which avoid its refinements by condemning in a broad way suspension of alienation beyond certain periods. For a discussion of the rule of common law and statutory prohibition against suspension of alienation, a late volume entitled Sears on Trust Estates as Business Companies should prove interesting.

If the same indefiniteness in respect to surface options is found in other mining deeds and contracts as are asserted to prevail in the coal and coke regions of the states mentioned, this decision is even of far wider importance than is stated. It is the spirit of American civilization, more even than when the doctrine in the rule against perpetuities was formulated three centuries ago, that no property should be taken out of the reach of the right of alienation for an unreasonable period, and every such restraint will be, as has been, "remorselessly" condemned.

MARRIAGE—INFANT MARRYING WITH PARENT'S CONSENT SUING FOR ANNULMENT.—The New York statute allows an action to annul a marriage because of one or both of the parties being under the age of legal consent; another statute provides that this is 18 years and another provides that where the man is under 21 and the woman under 18, the town clerk issuing a license shall require the written consent of the parents. It was ruled three years ago that a suit for annulment would lie, although the parents consent to the marriage. This ruling has been recently confirmed, the court saying: "The present law of New York permits an infant who marries under the age of 18 years with the con-

sent of her parents and who subsequently leaves her husband before she arrives at that age to come into court, and, as a matter of course, obtain a decree of annulment. This is to all intents and purposes providing in such cases for trial marriages, but it is a condition the remedy for which lies with the Legislature and not with the courts," Mundell v. Carter, 142 N. Y. Supp. 142.

It certainly would seem to be a very violent or narrow construction of statute to conclude that it was not intended to put an infant under 18 marrying with parents' consent on the same footing as if she were 18 and married without such consent. The state regards marriages for whose performance licenses are authorized to be issued as lawful marriages, and it seems folly to say that a lawful marriage may, "as a matter of course," be annuled on application. It may be thought bad enough for people sui juris to be contracting "trial marriages," but for a state to provide that parents may do this for their innocent children seems still more repugnant.

INSURANCE AGENT ISSUING POLICY TO CORPORATION OF WHICH HE IS STOCKHOLDER.—In Riverside Development Co. v. Hartford Fire Ins. Co., 61 So. 169, decided by Supreme Court of Mississippi, it was held that a policy of tornado insurance issued by an agent to a company in which he was a stockholder, of which fact the insurance company was ignorant until discovered after loss, was unenforceable, though there was no lack of good faith in its issuance.

The court relies on the rule that there being some discretion to be exercised in the issuance of such a policy his adverse interest to that of his principal made agent unable to bind his principal ignorant of such agreement. In answer to the claim that the property insured was not owned by the agent but by the corporation, the court replied that: "This distinction is too fine even to be worthy of consideration. It can hardly be said that a stockholder is not interested in the preservation of the property of the corporation in which he has stock." The general rule is that an agent cannot represent both himself and his principal without the principal's assent, but it would not seem that a contract of the kind condemned is precisely like that. The former would be void; the other voidable. When you get into the region of voidability there should be a reason for an advoidance of a contract between the principal of an agent and a third party duly qualified by law to enter into a contract. Thus it has been held that a contract between two corporations made through their respective boards of directors is not voidable from the mere circumstance that a minority of the board of one corporation are also directors of the other company. U. S. Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380. In the case decided by the Mississippi court there was not even a director in the case—no representation, therefore, in any sense of the assured by the agent, and, as the court says, "in writing tornado insurance this agent was not called upon to exercise the same degree of discretion that he is called upon to exercise in writing insurance of a different character." It does seem that here was an illustration of a salutary rule being pushed to an extremity and the right of the corporation in its purchase of a commodity, like insurance is, should have been upheld. The agent was dealing with a personality wholly distinct from himself and, presumptively, wholly adverse.

INJUNCTION AGAINST PROSPECTIVE NUISANCE.

Introductory.—It has been well said that "it can seldom, if ever, be said of a particular thing that it is always and under all circumstances a nuisance, or on the other hand, that it is never, and can never, become such." But it may be said of many things that, in the absence of some sort of negligence in respect of them, after they they come into existence, the law will never deem that they may become nuisances. There are also many things, it is my purpose to show, whose coming into existence in certain circumstances or surroundings, will be so sufficiently presumed to create nuisances as to authorize a court of equity to interpose injunctive remedy. The cases, which hereinafter follow, will expose the reasons for interposition and there is no need for me to anticipate by words of my own what will be not only better, but authoritatively, set forth. In treatment of the subject indicated by my caption, I have

(1) 29 Cyc. 1165, Title Nuisances.

thought it best to inquire for the basic principle in its application to those things, which in their nature possess inherent danger to life or property. Thence it will be attempted to trace the principle's application to other things, as to which it may be mitigated or disappear.

Manufacture or Storage of Explosives: There are cases of actions for damages from explosion, which, by analogy, support the claim that injunction would lie to prevent the erection and maintenance of magazines, as for example Heeg v. Light,[2] which hold that negligence in keeping need not be alleged, if the keeping itself amounted to a nuisance, but I have preferred, so far as possible, to cite and quote from injunction cases themselves. Such a case is found from Pennsylvania,[3] in which the opinion was written by one of the most distinguished jurists of this country, Justice Sharswood, but to it two of five justices dissented. This case was of a bill filed by thirteen complainants to enjoin defendant from erecting and maintaining a powder magazine near their dwellings. The averments show that defendant had recently begun to excavate for the erection of the magazine on a tract about ninety-two feet from a turnpike road, but the nearest point to any one of the complainants' property was 142 feet and the furthest 1,308 feet. It was averred that the immediate neighborhood was thickly settled and fast filling up with dwellings and other improvements. Danger to lives was averred to be threatened and property already had greatly depreciated in value. The answer claimed it was defendant's purpose to keep a safe, suitable and proper house for the storage of powder to be kept on hand by him as a legitimate dealer in an article of commerce, and he did not intend there to store powder in such quantities as to justify a reasonable apprehension of danger. The answer also states that the proposed building is to be fireproof and "to combine in its construction and management everything that science and experience in the business have demonstrated to be necessary in order to prevent accident or danger and to secure entire safety."

The case was referred and testimony taken. The Master in his findings and conclusions said: "I cannot discover from all the testimony in the case that the land of any of the plaintiffs except (naming five) lies in the immediate neighborhood of the magazine, nor that there are many other dwelling and small lot-holders, nor that the immediate neighborhood is thickly settled and fast building up." He recommended a decree dissolving the injunction, and the trial court, overruling exceptions, confirmed the master's report.

Having somewhat fully shown the situation, Justice Sharswood draws a distinction "between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection in such a vicinity. It ought to be a much clearer case to justify a court of equity in stretching forth the strong arm of injunction to compel a man to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, from that of one who comes into a neighborhood proposing to establish such a business and who is met at the threshold of his enterprise by a remonstrance and notice that, if he persists in his purpose, application will be made to a court of equity to prevent him." The justice then takes up, for himself, a discussion of the evidence, saying that, though it is evident that property values would be affected and the growth of the district retarded, yet this might not be sufficient reason for injunction, but both lives and property were in the zone of danger from forces which being let loose instantly prostrate everything near them." He thought there was a reasonable apprehension in all this which justified the court's

(2) 80 N. Y. 579, 36 Am. Rep. 654.
(3) Wier's Appeal, 74 Pa. St. 230.

preventing by injunction the erection of the powder house.

In action in a case where a powder house was struck by lightning and plaintiff's property in the vicinity was damaged,[4] what the court said in sustaining a recovery, illustrates how such a building might be decreed in some surroundings a nuisance *per se*. "If its explosion could only be produced by human agency . . . the question whether it is a nuisance or not might depend upon the manner in which it is kept. . . . But where we know that the electric fluid, the irresistible effects of which are disclosed in every thunder storm, may, in defiance of every precaution, at any moment cause it to explode, it cannot be doubted that if five hundred kegs were stored in a magazine in the heart of a city, every thunder storm would awaken a universal alarm and consternation in the minds of the inhabitants. But it is said the fears of mankind will not create a nuisance. That is very true, if these are idle and silly fears, produced by imaginary dangers. But in the case stated, the dangers would be real, and all men of reflection and prudence would feel them to be so; and therefore their apprehensions would be well founded." It is but a short step to say that this nuisance could have been prevented by enjoining the erection of a powder house in a thickly settled neighborhood.

A Kansas case[5] shows a suit to enjoin the erection of a powder house for storing explosives. The court proceeded upon the principle that the establishment of what would be a nuisance *per se* could be enjoined and then held that it was largely a question of fact whether the storing of a large quantity of dynamite in proximity to buildings is when properly done such a nuisance, reversing the case because of errors on the trial.

In Henderson v. Sullivan[6] the plaintiff sought to restrain the storing of dynamite upon an island about three-fourths of a mile away from another island where he resided. Defendant was a contractor for government work that had been carried on for some time, but the court, nevertheless, granted an injunction restraining him from storing dynamite in such quantity as to create danger to complainant or his family, or to his property. The court thought it was apparent that a reasonable amount of dynamite might be stored by defendant without injuring persons or property in the neighborhood, the public having a great interest in the work that was being done.

Erection of Building in Violation of Municipal Ordinance: In Bangs v. Dworak,[7] it was held, in effect, that a wooden building proposed to be placed on a lot adjoining the residence of plaintiff, in violation of a municipal ordinance, would be deemed a nuisance *per se*, if it would work special or irreparable injury to such a plaintiff, and its being so placed enjoined.[8] There are cases on this line which predicate the right of injunction on the fact, that plaintiff will be subjected to a higher rate of insurance from the proposed violation of a municipal ordinance.[9] This, of course, states with certainty the special damage that would flow. *E contra* may be cited a Missouri case,[10] but in this case it does not appear that plaintiff would suffer any special damage. The court seemed disposed to the view, however, that this would have made no difference, because there was provided an adequate legal remedy by prosecution for such a violation. But this class of cases resembles not very greatly those in which the principle *sic utere tuo ut alienum non laedas* is the principal ques-

(4) Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734.

(5) Remsberg v. Iola Portland Cement Co., 73 Kan. 66, 84 Pac. 548.

(6) 159 Fed. 46, 86 C. C. A. 226.

(7) 75 Neb. 603, 106 N. W. 780, 5 L. R. A. (N. S.) 493.

(8) See also First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185; Griswold v. Brega, 160 Ill. 490, 43 N. E. 864, 52 Am. St. Rep. 350.

(9) Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; Horstman v. Young, 13 Phila. 19.

(10) Rice v. Jefferson, 50 Mo. App. 464.

tion involved. The former depends upon extraneous aid, that is to say, special injury from violation of an ordinance.

General Rule as to Injunction Against Structures for a Lawful Business: Before coming to cases hereinafter as to hospitals for contagious diseases it may be well to state the principle upon which injunction against the erection of structures in a business not a nuisance *per se* may be granted. This principle is well discussed in an Indiana case.[11] There the principle is stated to be that: "A business which merely threatens to become a nuisance will be enjoined only when the threatened nuisance is inevitable." In New Jersey[12] it is said: 'It must be clear that the business will be a nuisance and that it cannot be carried on so as not to be such." In Mississippi[13] it is said: "Every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive both to individual gain and the general welfare." In North Carolina it was said: "When injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate."[14] In this state this rule was recognized in regard to use of property which threatened, or was alleged to threaten health, though it was thought courts would be more alert to prevent injury for this reason, than where mere comfort or convenience is involved.[15] This case will be more fully considered hereinafter.

Establishing Hospitals for Treatment of Contagious Diseases: By far the greater number of cases in regard to hospitals refer either to suits for damages or to abatement, in which much could be relied upon for contention, that injunction to prevent their location is maintainable. There are, however, cases in which relief by injunction against the location of hospitals for the treatment of contagious diseases has been granted. One of the most interesting cases on this subject arose in Maryland.[16] It shows that after a city had abandoned, or seemingly abandoned, property it used as a place of quarantine against contagious diseases brought toward the city by water, purchasing and using other property instead, and a suburban neighborhood had been developed upon adjoining property, it was about to use the former quarantine station in caring for a woman afflicted with leprosy. It was urged that the city had plenary power to establish, both within and without its limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases, and the exercise of this power for the public health was highly essential. This grant of power was not thought, however, to impair or affect "the right of an individual to complain of the special injury sustained by him as a consequence," of its being exercised. It was said: "However broad may be the powers of a municipality to erect and maintain hospitals and pest houses for the segregation and treatment of contagious diseases, and however necessary their exercise may be, they must, generally speaking, be exerted and put into operation subject to the no less well defined right of the individual to possess and enjoy his unoffending property without molestation of a nuisance." The opinion speaks of leprosy as being "universally regarded with horror and loathing," and of that sentiment being "as deep-rooted today as it was more than two thousand years ago in Palestine," and the court

(11) Windfall Mfg. Co. v. Patterson, 148 Ind. 114, 62 Am. St. Rep. 522.

(12) Duncan v. Hayes, 22 N. J. Eq. 25.

(13) McCutchen v. Blanton, 59 Miss. 116.

(14) Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. (N. S.) 221.

(15) Cherry v. Williams, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, 15 A. & E. Ann. Cas. 715.

(16) Baltimore v. Fairfield Improvement Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344.

thought that the dread of it, however medical experts might now believe that contagion is remote and by no means dangerous, was a sufficient reason for deeming the presence of a leper in a neighborhood a private nuisance, such as a court of equity may prevent by injunction.

Quoting it was said: "In all such cases the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is virtually productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits and as in view of the circumstances of the case is unreasonable and in derogation of the rights of complainant."[17] The proposed placing of the leper, therefore, was enjoined.

While the Fairfield Improvement Company case shows that authority conferred on a municipality gives it no more right to sacrifice private right by creating a nuisance *per se*, a Texas case[18] carries the thought that injunction against the establishment of a pest house by county officers may proceed somewhat on the theory that they do not wisely act in the public interest in the exercise of their powers, the case cited showing a permanent injunction against establishing a pest house for smallpox patients in the vicinity of a public school.

In North Carolina a case concerned the establishment of a tuberculosis sanatorium.[19] The plaintiffs were owners of a lot nearby on the same street where the sanatorium was proposed to be located, with cabins for the occupation of patients, all being in a thickly populated section of the City of Greensboro. The court thought that such use of this property would be "a source of real danger to the lives and health of a number of people living in that vicinity."

In an Illinois case[20] the injunction was not to prevent the erection of a hospital, but it proceeded on the theory that it could not be operated at all so as not to be a menace to the health of plaintiff and his family and the claim was made that she ought to have objected before it was there located, and the opinion in the case recited evidence to show she did object and defendant built with the expectation that the question would be litigated. The decree restrained the carrying on and operating the hospital in the place where it was located, the court saying: "The difficulty seems to come about from the fact that the grounds occupied by appellant are wholly inadequate in extent for the operation of a hospital of the character there conducted. Of course, if this could have been foreseen before it was erected, injunction would have prevented its location upon such an inadequate area."

The idea of widespread dread, instead of idle fears, set forth *supra*, as ground for injunction appears in a Kansas case.[21] There a hospital for the treatment of patients afflicted with cancer was about to be established in a building formerly used as a dwelling house in Kansas City, Kan. This building seemed somewhat isolated, i. e. the nearest house, that of plaintiff, being 78 feet away and there being an intervening alley. Two other residences were ninety-feet away and three others about 150 feet. The neighborhood was used entirely for residences. The court spoke of the prevailing medical view against cancer being infectious, and there not being an entire concurrence therein, and, therefore, it was "quite within bounds, to say that whether or not there is actual danger under the conditions stated, the fear of it is not entirely unreasonable." This case relies among others on the Bontjes and Fairfield cases *supra* and says: "The question is not whether the establishment of the hos-

(17) See also Dittman v. Repp, 50 Md. 521, 33 Am. Rep. 325.
(18) Thompson v. Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 525.
(19) Cherry v. Williams, supra.
(20) Deaconess Hospital v. Bontjes, 207 Ill. 533, 69 N. E. 748, 64 L. R. A. 215.
(21) Mutter v. Rochelle, 65 Kan. 86, 69 Pac. 795.

it was no reason for refusing the increase of stock asked for that these undivided profits on hand or that the dividends to be afterwards earned could pay for the additions. The question was whether "the sum (to be) raised goes to increase the value of the plant for the purposes of the business for which the petitioner was incorporated."

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Introductory.—It has been well said that "it can seldom, if ever, be said of a particular thing that it is always and under all circumstances a nuisance, or on the other hand, that it is never, and can never, become such." But it may be said of many things that, in the absence of some sort of negligence in respect of them, after they they come into existence, the law will never deem that they may become nuisances. There are also many things, it is my purpose to show, whose coming into existence in certain circumstances or surroundings, will be so sufficiently presumed to create nuisances as to authorize a court of equity to interpose injunctive remedy. The cases, which hereinafter follow, will expose the reasons for interposition and there is no need for me to anticipate by words of my own what will be not only better, but authoritatively, set forth. In treatment of the subject indicated by my caption, I have

(1) 29 Cyc. 1165, Title Nuisances.

thought it best to inquire for the basic principle in its application to those things, which in their nature possess inherent danger to life or property. Thence it will be attempted to trace the principle's application to other things, as to which it may be mitigated or disappear.

Manufacture or Storage of Explosives: There are cases of actions for damages from explosion, which, by analogy, support the claim that injunction would lie to prevent the erection and maintenance of magazines, as for example Heeg v. Light,[2] which hold that negligence in keeping need not be alleged, if the keeping itself amounted to a nuisance, but I have preferred, so far as possible, to cite and quote from injunction cases themselves. Such a case is found from Pennsylvania,[3] in which the opinion was written by one of the most distinguished jurists of this country, Justice Sharswood, but to it two of five justices dissented. This case was of a bill filed by thirteen complainants to enjoin defendant from erecting and maintaining a powder magazine near their dwellings. The averments show that defendant had recently begun to excavate for the erection of the magazine on a tract about ninety-two feet from a turnpike road, but the nearest point to any one of the complainants' property was 142 feet and the furthest 1,308 feet. It was averred that the immediate neighborhood was thickly settled and fast filling up with dwellings and other improvements. Danger to lives was averred to be threatened and property already had greatly depreciated in value. The answer claimed it was defendant's purpose to keep a safe, suitable and proper house for the storage of powder to be kept on hand by him as a legitimate dealer in an article of commerce, and he did not intend there to store powder in such quantities as to justify a reasonable apprehension of danger. The answer also states that the proposed building is to be fireproof and "to combine in its construction and management everything that science and experience in the business have demonstrated to be necessary in order to prevent accident or danger and to secure entire safety."

The case was referred and testimony taken. The Master in his findings and conclusions said: "I cannot discover from all the testimony in the case that the land of any of the plaintiffs except (naming five) lies in the immediate neighborhood of the magazine, nor that there are many other dwelling and small lot-holders, nor that the immediate neighborhood is thickly settled and fast building up." He recommended a decree dissolving the injunction, and the trial court, overruling exceptions, confirmed the master's report.

Having somewhat fully shown the situation, Justice Sharswood draws a distinction "between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection in such a vicinity. It ought to be a much clearer case to justify a court of equity in stretching forth the strong arm of injunction to compel a man to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, from that of one who comes into a neighborhood proposing to establish such a business and who is met at the threshold of his enterprise by a remonstrance and notice that, if he persists in his purpose, application will be made to a court of equity to prevent him." The justice then takes up, for himself, a discussion of the evidence, saying that, though it is evident that property values would be affected and the growth of the district retarded, yet this might not be sufficient reason for injunction, but both lives and property were in the zone of danger from forces which being let loose instantly prostrate everything near them." He thought there was a reasonable apprehension in all this which justified the court's

(2) 80 N. Y. 579, 36 Am. Rep. 654.
(3) Wier's Appeal, 74 Pa. St. 230.

preventing by injunction the erection of the powder house.

In action in a case where a powder house was struck by lightning and plaintiff's property in the vicinity was damaged,[4] what the court said in sustaining a recovery, illustrates how such a building might be decreed in some surroundings a nuisance *per se*. "If its explosion could only be produced by human agency . . . the question whether it is a nuisance or not might depend upon the manner in which it is kept. . . . But where we know that the electric fluid, the irresistible effects of which are disclosed in every thunder storm, may, in defiance of every precaution, at any moment cause it to explode, it cannot be doubted that if five hundred kegs were stored in a magazine in the heart of a city, every thunder storm would awaken a universal alarm and consternation in the minds of the inhabitants. But it is said the fears of mankind will not create a nuisance. That is very true, if these are idle and silly fears, produced by imaginary dangers. But in the case stated, the dangers would be real, and all men of reflection and prudence would feel them to be so; and therefore their apprehensions would be well founded." It is but a short step to say that this nuisance could have been prevented by enjoining the erection of a powder house in a thickly settled neighborhood.

A Kansas case[5] shows a suit to enjoin the erection of a powder house for storing explosives. The court proceeded upon the principle that the establishment of what would be a nuisance *per se* could be enjoined and then held that it was largely a question of fact whether the storing of a large quantity of dynamite in proximity to buildings is when properly done such a nuisance, reversing the case because of errors on the trial.

In Henderson v. Sullivan[6] the plaintiff sought to restrain the storing of dynamite upon an island about three-fourths of a mile away from another island where he resided. Defendant was a contractor for government work that had been carried on for some time, but the court, nevertheless, granted an injunction restraining him from storing dynamite in such quantity as to create danger to complainant or his family, or to his property. The court thought it was apparent that a reasonable amount of dynamite might be stored by defendant without injuring persons or property in the neighborhood, the public having a great interest in the work that was being done.

Erection of Building in Violation of Municipal Ordinance: In Bangs v. Dworak,[7] it was held, in effect, that a wooden building proposed to be placed on a lot adjoining the residence of plaintiff, in violation of a municipal ordinance, would be deemed a nuisance *per se*, if it would work special or irreparable injury to such a plaintiff, and its being so placed enjoined.[8] There are cases on this line which predicate the right of injunction on the fact, that plaintiff will be subjected to a higher rate of insurance from the proposed violation of a municipal ordinance.[9] This, of course, states with certainty the special damage that would flow. *E contra* may be cited a Missouri case,[10] but in this case it does not appear that plaintiff would suffer any special damage. The court seemed disposed to the view, however, that this would have made no difference, because there was provided an adequate legal remedy by prosecution for such a violation. But this class of cases resembles not very greatly those in which the principle *sic utere tuo ut alienum non laedas* is the principal ques-

(4) Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734.

(5) Remsberg v. Iola Portland Cement Co., 73 Kan. 66, 84 Pac. 548.

(6) 159 Fed. 46, 86 C. C. A. 236.

(7) 75 Neb. 603, 106 N. W. 780, 5 L. R. A. (N. S.) 493.

(8) See also First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185; Griswold v. Brega, 160 Ill. 490, 43 N. E. 864, 52 Am. St. Rep. 350.

(9) Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; Horstman v. Young, 13 Phila. 19.

(10) Rice v. Jefferson, 50 Mo. App. 464.

tion involved. The former depends upon extraneous aid, that is to say, special injury from violation of an ordinance.

General Rule as to Injunction Against Structures for a Lawful Business: Before coming to cases hereinafter as to hospitals for contagious diseases it may be well to state the principle upon which injunction against the erection of structures in a business not a nuisance *per se* may be granted. This principle is well discussed in an Indiana case.[11] There the principle is stated to be that: "A business which merely threatens to become a nuisance will be enjoined only when the threatened nuisance is inevitable." In New Jersey[12] it is said: 'It must be clear that the business will be a nuisance and that it cannot be carried on so as not to be such." In Mississippi[13] it is said: "Every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive both to individual gain and the general welfare." In North Carolina it was said: "When injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate."[14] In this state this rule was recognized in regard to use of property which threatened, or was alleged to threaten health, though it was thought courts would be more alert to prevent injury for this reason, than where mere comfort or convenience is involved.[15] This case will be more fully considered hereinafter.

Establishing Hospitals for Treatment of Contagious Diseases: By far the greater number of cases in regard to hospitals refer either to suits for damages or to abatement, in which much could be relied upon for contention, that injunction to prevent their location is maintainable. There are, however, cases in which relief by injunction against the location of hospitals for the treatment of contagious diseases has been granted. One of the most interesting cases on this subject arose in Maryland.[16] It shows that after a city had abandoned, or seemingly abandoned, property it used as a place of quarantine against contagious diseases brought toward the city by water, purchasing and using other property instead, and a suburban neighborhood had been developed upon adjoining property, it was about to use the former quarantine station in caring for a woman afflicted with leprosy. It was urged that the city had plenary power to establish, both within and without its limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases, and the exercise of this power for the public health was highly essential. This grant of power was not thought, however, to impair or affect "the right of an individual to complain of the special injury sustained by him as a consequence," of its being exercised. It was said: "However broad may be the powers of a municipality to erect and maintain hospitals and pest houses for the segregation and treatment of contagious diseases, and however necessary their exercise may be, they must, generally speaking, be exerted and put into operation subject to the no less well defined right of the individual to possess and enjoy his unoffending property without molestation of a nuisance." The opinion speaks of leprosy as being "universally regarded with horror and loathing," and of that sentiment being "as deep-rooted today as it was more than two thousand years ago in Palestine," and the court

(11) Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 62 Am. St. Rep. 532.

(12) Duncan v. Hayes, 22 N. J. Eq. 25.

(13) McCutchen v. Blanton, 59 Miss. 116.

(14) Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. (N. S.) 321.

(15) Cherry v. Williams, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, 15 A. & E. Ann. Cas. 715.

(16) Baltimore v. Fairfield Improvement Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344.

thought that the dread of it, however medical experts might now believe that contagion is remote and by no means dangerous, was a sufficient reason for deeming the presence of a leper in a neighborhood a private nuisance, such as a court of equity may prevent by injunction.

Quoting it was said: "In all such cases the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is virtually productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits and as in view of the circumstances of the case is unreasonable and in derogation of the rights of complainant."[17] The proposed placing of the leper, therefore, was enjoined.

While the Fairfield Improvement Company case shows that authority conferred on a municipality gives it no more right to sacrifice private right by creating a nuisance *per se*, a Texas case[18] carries the thought that injunction against the establishment of a pest house by county officers may proceed somewhat on the theory that they do not wisely act in the public interest in the exercise of their powers, the case cited showing a permanent injunction against establishing a pest house for smallpox patients in the vicinity of a public school.

In North Carolina a case concerned the establishment of a tuberculosis sanatorium.[19] The plaintiffs were owners of a lot nearby on the same street where the sanatorium was proposed to be located, with cabins for the occupation of patients, all being in a thickly populated section of the City of Greensboro. The court thought that such use of this property would be "a source of real danger to the lives and health of a number of people living in that vicinity."

(17) See also Dittman v. Repp, 50 Md. 521, 33 Am. Rep. 325.
(18) Thompson v. Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 528.
(19) Cherry v. Williams, supra.

In an Illinois case[20] the injunction was not to prevent the erection of a hospital, but it proceeded on the theory that it could not be operated at all so as not to be a menace to the health of plaintiff and his family and the claim was made that she ought to have objected before it was there located, and the opinion in the case recited evidence to show she did object and defendant built with the expectation that the question would be litigated. The decree restrained the carrying on and operating the hospital in the place where it was located, the court saying: "The difficulty seems to come about from the fact that the grounds occupied by appellant are wholly inadequate in extent for the operation of a hospital of the character there conducted. Of course, if this could have been foreseen before it was erected, injunction would have prevented its location upon such an inadequate area."

The idea of widespread dread, instead of idle fears, set forth *supra*, as ground for injunction appears in a Kansas case.[21] There a hospital for the treatment of patients afflicted with cancer was about to be established in a building formerly used as a dwelling house in Kansas City, Kan. This building seemed somewhat isolated, i. e. the nearest house, that of plaintiff, being 78 feet away and there being an intervening alley. Two other residences were ninety-feet away and three others about 150 feet. The neighborhood was used entirely for residences. The court spoke of the prevailing medical view against cancer being infectious, and there not being an entire concurrence therein, and, therefore, it was "quite within bounds, to say that whether or not there is actual danger under the conditions stated, the fear of it is not entirely unreasonable." This case relies among others on the Bontjes and Fairfield cases *supra* and says: "The question is not whether the establishment of the hos-

(20) Deaconess Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215.
(21) Statler v. Rochelle, 83 Kan. 86, 109 Pac. 788.

pital would place the occupants of the adjacent dwellings in actual danger of infection, but whether they would have reasonable ground to fear such a result, and, whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property would not be materially interfered with by the bringing together of a considerable number of cancer patients in this place. However carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities." The injunction was made permanent, and this case was later approved.[22]

Summary: I have given enough cases to show, that, when a business or an institution is to be located in the midst of a certain environment, the court will look into the question to ascertain whether its conduct necessarily will there introduce danger or cause to exist a reasonable dread thereof. If so the principles *sic utere tuo ut alienum non laedas* will come into play. The right to injunction in advance of such a business or establishment being located naturally would seem clearer than where one complains who comes into a zone of danger, and we think the cases above cited and quoted from so indicate. Of course, there must be opportunity to locate places for the storage of such dangerous commodities as gunpowder and dynamite, and, *a fortiori* for the location of hospitals and pest houses, but it must be observed, that no merchant, philanthropist nor municipality may disregard the particular rights of citizens in the enjoyment of their property and being free from reasonable dread of danger. These citizens, however, are not entitled, in a practical society, to have their idle fears nor their supersensitiveness regarded or, always, to complain that their property is being depreciated. These things come rather within what should be contemplated. The cases I have used are somewhat replete with citation, and repetition here would serve no purpose.

N. C. COLLIER.

St. Louis, Mo.

(22) State v. Lindsay, 85 Kan. 79, 84, 116 Pac. 207.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.

GEROMINI v. BRUNELLE.

Supreme Judicial Court of Massachusetts. Norfolk. May 22, 1913.

102 N. E. 68.

A person who gives a husband advice, with an honest and friendly desire to assist him, even though it leads to his separation from his wife, and may turn out not to have been the best advice that could have been given, is not liable to the wife, in the absence of malice.

MORTON, J. The only exception in this case is to the refusal of the court to instruct the jury as requested by the plaintiff that she need not prove malice on the part of the defendant in order to entitle her to recover. We do not understand the plaintiff to find any fault with the instructions that were given if the instruction requested was rightly refused.

We think that the instruction asked for could not have been properly given. In Tasker v. Stanley, 153 Mass. 148, 150, 26 N. E. 417, 10 L. R. A. 468, in an action for alienating the affections of the plaintiff's wife and enticing her to leave him, it was held that the defendants had a right to show that their advice was honestly given with a view to the welfare of both parties, and that in order to render them liable it should appear that the advice was not given honestly or was given from malevolent motives. We think that the same principles apply in an action by the wife for persuading and enticing her husband to leave her and take with him their minor children. It is true that the husband is bound to support his wife and that he is liable to a criminal complaint if he unreasonably refuses or neglects to do so. But we do not think that that fact can affect his right to such advice or render a third party liable for advice which is given with an honest and friendly

desire to assist him even though it may lead to his separation from his wife and may turn out not to have been the best advice that could have been given. The liability of the defendant does not depend upon whether the separation resulted wholly or in part from the advice which he gave, but quo animo the advice was given. There must have been an invasion of the plaintiff's rights in some form by the defendant in order to entitle her to maintain an action against him. In order to show that in the present case she had to show malice on his part. This she failed to do. It follows that the exceptions must be overruled. See Corey v. Eastman, 166 Mass. 279, 287, 44 N. E. 217, 55 Am. Rep. 401; Plant v. Woods, 176 Mass. 492, 500, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. Rep. 330; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322, 9 Ann. Cas. 958.

Exceptions overruled.

NOTE.—*Motive as Protecting Stranger in Giving Advice Causing Alienation of Affections.*—The broad statement or ruling made by the instant case seems not to be sound as law, because rather not only is there presumption of wrongful motive, but also a stranger howsoever friendly or honest in his desire has no right except under extraordinary circumstances to interfere, as we think the following cases tend to show:

In Hartpence v. Rogers, 143 Mo. 623, 45 S. W. 650, there were instructions by the court, the case being for alienation by a stranger, containing "direction to the jury to find for plaintiff, if they believed from the evidence that defendant intentionally persuaded plaintiff's wife to separate and remain apart from him." It was argued that proof alone of the fact of such persuasion, without reference to its motive was not sufficient to make a third person liable, as such persuasion might be from the best of motives. It was said: "This court answered a similar contention in the following language: 'The wife may have a just cause for separation or divorce, but she may elect to abide by her situation and abide with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife and if he voluntarily do so, he is amenable for the consequences. * * * No one unasked, especially a stranger, has the right to volunteer his advice or protection, and if he does so, he is amenable." Modisett v. McPike, 74 Mo. 646.

In Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574, it was said, in effect, that such instructions would be wholly inapplicable in a suit against a parent, but no "third person, or stranger lawfully may persuade a husband to leave his wife because he was mistreating her, if she is willing to endure his usage."

In Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, in a case where a guardian had written advising his ward to separate from his wife, the court said in declaring an instruction erroneous, that: "There is a well-defined distinction, recognized by the authorities, between the privileges of parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers, particularly those of the opposite sex, in advising in these matters. Where advice is given by a parent or guardian, which leads to a separation by the child or ward from husband or wife, the presumption is that the advice was given in good faith; but where such advice is given by a stranger, the presumption is otherwise; and when an action for alienation of affections is brought against a parent or guardian, the gist of the action is the good faith in which the advice is given. Consequently it is a good defense on the part of the parent or guardian to an action of this nature that they advise the child or ward from honest motives, in a sincere belief that the advice given was for the moral and social good of the child or ward." It may be stating it a little strongly to say this constitues a good defense, but that there is a distinction is not to be doubted. That a wrongheaded parent or guardian may with the impunity of good faith and honest motives break up households of children or wards is to be doubted.

Powell v. Benthall, 136 N. C. 145, 48 S. E. 598, was a suit against the wife's brother-in-law and his wife for harboring of plaintiff's wife after being expressly forbidden so to do. The testimony showed that the wife had gone to defendant's house by agreement with her husband and she said she would not live with him again and defendants merely permitted her to remain at their house. It was said the relationship could be considered by the jury upon the question of good faith. "We do not intend to say that if it appeared that they actively procured the separation, or counseled and advised its continuance, they would not be liable—but where the question of motive is essential to be shown, the relationship is not only relevant but material." The view generally, however, was that of wife's right to appeal to her relatives not to drive her from their house and their assent was not a tort in the modern view of her status.

In Frank v. Frank, 159 Mo. App. 543, 141 S. W. 692, much is said about the difference between an interference by parents and where "a stranger has intentionally thrust himself between husband and wife." There is no inference of malice from parental interference and the burden is on plaintiff to show there was malice. It is not said expressly that interference by a third person presumes malice, but this seems implied from what is said.

In Luick v. Arends, N. D., 132 N. W. 353, the action was against a stranger and the opinion after stating that, "the law recognizes the right of the parent, brother, sister or near blood relative to interfere when prompted by proper motives, without malice and for the supposed welfare of the party counseled," says "a stranger stands on different ground entirely." In his case "the causes must be extreme that will warrant him in interfering with the relations of husband and wife. If he, by advice or enticement, induces a wife to leave her husband, or takes her away with or without her consent, and encourages her to remain away from him, he does those things at his peril and the burden is on him to show good cause and good faith for his conduct." Further it is said: "It would seem on principle to be rare indeed if the motive of a

stranger in breaking up a family could be a good one." See also Boland v. Stanley, 88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114; Klein v. Klein, 31 Ky. Law Rep. 28, 101 S. W. 382; Heisler v. Heisler, Iowa, 132 N. W. 676. C.

ITEMS OF PROFESSIONAL INTEREST.

MEETING OF THE NEVADA LAWYERS.

The regular annual meeting of the Nevada State Bar Asociation will be held in Reno on October 31st, which is Admission Day, the anniversary of the day on which Nevada was admitted into the Union. The principal speaker will be Hon. W. H. Beatty, formerly Justice of the Supreme Court of Nevada and now Chief Justice of the Supreme Court of California; also, Judge Charles W. Slack, of San Francisco.

REPORT OF MEETING OF VIRGINIA BAR ASSOCIATION.

In response to your request for a short report of the proceedings of the Annual Meeting of our State Bar Association held at the Hot Springs, July the 29th to 31st, I will give you the following summary:

The meeting was presided over by the President, Prof. William M. Lile, Dean of the Law School of the University of Virginia, who delivered an address entitled "Exaltation of Secondary Authority." The purpose of the address was to show the tendency of the bench and bar to content themselves with the statements of law as laid down in encyclopedias, digests and text writers, instead of going to the original sources of authority. The address pointed out the weakness of the opinions of many of the courts of last resort due to this tendency, and showed how the same might be remedied, and the address gave many valuable hints and suggestions to the bar in the preparation of briefs.

One of the important matters acted on at the meeting was the discussion and adoption of a report of the Committee on Legal Edueation and admission to the Bar, which tended to make fairer and more thorough the test of the knowledge of the candidates for admission to the Bar. Another matter of importance discussed and acted on was the report of the special committee on Reform of Judicial Proceedure, of which Mr. Thomas W. Shelton, of Norfolk, Virginia, was chairman. This report recommended the endorsement of the movement now being pushed by the American Bar Association to have the United States Supreme Court clothed with authority to make rules of proceedure in common law cases, as they already have in equity cases, and also recommended that the Supreme Court of Appeals of Virginia be clothed with like authority in the matter of state proceedure, both in equity and common law proceedure. Both of these recommendations were adopted, and a committee appointed to attempt to secure from the Virginia State Legislature passage of a bill to carry the second recommendation of the committee into effect.

The principal address was delivered by Hon. Hampton L. Carson of the Philadelphia Bar, ex-Attorney General of the State of Pennsylvania, and now President of the Pennsylvania Bar Association, the title of whose address was "The Place Occupied by the Judiciary in Our American Constitutional System." The address was a most able and eloquent one, and will prove a valuable addition to the literature of the subject, dealing as it does with the constitutional history of our government from the standpoint of the courts of highest resort in the states and in the nation, paying a very high tribute to the judiciary, and closing with a strong argument in opposition to the doctrine of recall of judges and of judicial decisions.

Instead of having several papers from selected members of the Association, it was decided this year to select as the main topic of discussion for the meeting the subject of "Tax Reform in Virginia" and Hon. R. E. Byrd, late speaker of the House of Delegates, was selected to lead the discussion. One entire session of the meeting was devoted to this discussion and resulted in the adoption of a resolution favoring a system equalizing assessment of property through the state as a preliminary to the adoption of a plan of segregation of different classes of property for state and local purposes.

The officers elected for the year 1913-14 are as follows: As President, Major Samuel Griffin of Bedford City, Virginia; as Vice-Presidents, Hon. W. A. Anderson of Lexington, Virginia, Hon. John S. Barbour of Fairfax, Virginia, Mr. Robert B. Tunstall of Norfolk, Virginia, Mr. Richard B. Davis of Petersburg, Virginia, and Mr. Preston W. Campbell of Abingdon, Virginia. As Secretary and Treasuer, Mr. John B. Minor of Richmond, Virginia.

Hoping that the information nerein contained is what you desire, I am,

Very truly yours,
JOHN B. MINOR,
Secretary.

Richmond, Va.

CORAM NON JUDICE

REGULATING POWER OF COURT TO NULLIFY LEGISLATION.

So much attention has lately been bestowed upon court decisions nullifying acts of a Legislature on constitutional grounds that the Ohio convention's judgment regarding the power of Ohio courts is very interesting and significant. It was proposed that the Supreme Court be denied the power to declare a law unconstitutional. but this was defeated.

What was adopted was a provision requiring five of the six judges to concur in any judgment declaring unconstitutional a legislative act. If one judge is ill or detained, all present must concur, and it follows that two absent judges could prevent a law from being pronounced invalid. If, however, a law has been held invalid by the lower court only three judges of the Supreme Court are required to sustain the nullification of the act. This follows from the provision that when Supreme Court judges divide equally on a case from the lower court, the lower court's decision shall be regarded as sustained. There is nothing inherently bad in these provisions.

In regard to declaring a law unconstitutional, the number of votes in the majority should not necessarily be a bare majority of the court. It is a serious matter to nullify an act of the Legislature, and the requirement of more than a majority of the judges in concurrence should go far toward dulling criticism of the judiciary for usurping legislative power.—Springfield Republican.

NON-PARTISAN TICKET FOR JUDGES.

Apropos of Editorial, 76 C. L. J., 91, urging a non-partisan primary for selection of judges and a separate non-partisan ballot for their election we observe that Judge Charles S. Cutting, in an address at a meeting of the Chicago Bar Association, of January 30th, 1913, as noticed by our contemporary, the Chicago Legal News, urged the non-partisan election of judges, saying that: "When that time came and the names of all judicial candidates appear upon a ticket in one list upon a separate ballot, with no designation of party affiliation, the result would be the election of the best men for the positions and a thorough confidence in the minds of the people in the judges so elected."

It was just about this time our editor was writing the editorial above referred to, and we are unable to say whether Judge Cutting or we had the benefit of telepathy in what was said. It is reasonably certain, however, we are in happy agreement. We are, indeed, so enamored of this idea that we would like to hear from our brethren about this plan.—Editor.

VIRGINIA FALLING IN LINE ON REFORM IN PROCEDURE.

Old Virginia has caught the fever—the lawyers have demanded a reform in the procedure of that state, and at the last meeting of the Bar Association passed the following resolution:

Whereas, it is important that Virginia should take a positive stand with reference to the present active propaganda looking to the reform of pleading and procedure and that a report, together with all such recommendations as may appeal to the Committee as pertinent be made to the next annual meeting of this Association,

Be It Resolved, That the president of this Association be, and he is hereby authorized to appoint a Committee to be composed of five members of this Association to be known as the "Committee on Reform of Judicial Procedure," the duties of which shall be:

First. To report, as far as practicable, to this Association at its next annual meeting, the history of such reforms as have been put into effect in other states and as are being considered by the American Bar Association and the various State Bar Associations and to make recommendations regarding the same;

Second. To make specific recommendations with reference to the present system of pleading and procedure in effect in the State of Virginia, looking to the improvement thereof.

Mr. Thomas W. Shelton, of Norfolk, Va., is the chairman of the new committees. Readers of the Central Law Journal who have read Mr. Shelton's articles in the Journal for the last two years in his campaign for an intelligent program of reform of procedure will be interested in following the work of this committee.

A. H. R.

BOOK REVIEWS.

STREET RAILWAY REPORTS, VOL. 8.

In 75 Cent. L. J. 411, we noticed this series of reports. They include decisions, with annotation by the editor, by federal and state courts in street railway cases.

This number embraces index to special notes in the 8 volumes which have appeared and an index-digest of cases therein. Later reports are correlated with prior ones, so that authority on any question that has been decided and in these reports treated, easily may be traced by practitioners.

This undertaking as to a special line is practically framed and the volumes are all handsome in appearance and of substantial character in their binding in law buckram and are hail from the well-known publishing house, Matthew Bender & Company, Albany, N. Y. 1913.

LAND TITLE GUARANTY LAW OF NORTH CAROLINA.

An interesting brochure, 12 mo. of 108 pages in paper cover, occasioned by enactment by the General Asembly of North Carolina of a Torrens on Land Title Guaranty law, is by Mr. Bruce Craven, of the North Carolina bar. This law goes into effect January 1, 1914, and full text thereof appears in this publication.

Mr. Craven gives an interesting review of progress of this kind of legislation, showing what states have adopted it and what decision has appeared with regard to its constitutionality. He also gives an analysis of the North Carolina law and praises its advantages. We cannot see, however, that the idea has attained any great encouragement, considering the length of time the subject has been agitated. At the

same time, it seems to persist. It may be that there is merely that general interest in this kind of legislation, which lacks the push behind it that special benefit would supply, and certainly there are businesses to be put "out of business," so to speak, by its adoption. It is rather hard for altruism in a commercial age to forge ahead.

The publication is by Observer Printing House, Charlotte, N. C., 1913.

TARDE'S PENAL PHILOSOPHY.

This very excellent volume is by Gabriel Tarde, State Magistrate and Professor in the College of Rome, and is one of the publications in the Modern Criminal Science Series, published under the auspices of The American Institute of Criminal Law and Criminology.

In the editorial prefaced by Mr. Edward Lindsey, of the Warren, Pa., Bar, also an Associate Editor of said American Institute, it is seen that Professor Tarde has for many years been a distinguished writer on criminology, often criticising the theories of Lambroso, with whom he seems to have been in radical disagreement. According to Mr. Lindsey it was during a judicial career extending over twenty-five years that Professor Tarde's writings "established his reputation as a profound philosopher and a scholar of comprehensive learning."

This volume is put forward by the American Institute, in a translation by Mr. Rapelje Howard of the New York Bar, as richly deserving a place in the Modern Criminal Science Series, and its reasoning and the statistics on which it is based, in the endeavor to trace the causes of crime, make the book well worth careful perusal and study.

The volume is bound in red cloth, of finished excellence and published by Little, Brown & Company, Boston, 1912.

JENKS' SHORT HISTORY OF ENGLISH LAW.

This volume, by Mr. Edward Jenks, M. A. B. C. L., of the Middle Temple, Barrister at Law and Principal and Director of Legal Studies of the Law Society, purports to give a short, but comprehensive, manual of English law from the earliest times to the end of the year 1911. Other works by Sir Fitzjames Stephen, Sir Frederick Pollok, Mr. Justice Holmes, and Professor Maitland, were thought to be planned on a line which made them "unsuitable for the average student, whose time was limited," and a "History of English Law" in one volume was deemed to be needed. In this one volume work, therefore, a condensation which could without serious loss be thus confined is aimed at.

The author is one of the brilliant and, also, accurate law writers of his time. He divides his consideration of English Law into four periods, the first before the Norman Conquest, the second from then to the death of Henry III (1066-1272), the third from Edward I to the Commonwealth (1272-1660) and thence to 1911. This division is attractive and presents growth and contrasts clearly and helps to present the philosophy of history along with the tracing of jurisprudence in the different civilizations of England. This is not only interesting but in many ways of advantage to the American lawyer in an intimate knowledge of so much of our law. It helps along his ideals and tempers effort to revolutionize by statutory enactment what the growth of centuries has produced. This is needed in our rapidly moving age. The student is more obscured now than was wont, but abortiveness in legislation is as much in evidence as it ever has been.

This volume is attractive in form, the treatment of the subject is logical in arrangement, the style of the author succinct and clear. The book is bound in cloth, typography of the best, and is published by Little, Brown & Co., Boston, 1912.

HUMOR OF THE LAW.

'What's Wigley's idea in suing his wife for a divorce? I always thought they got along beautifully. In fact, I always regarded Wigley as a sort of matrimonial enthusiast."

"He is. And that's just the trouble. Wigley figures that by the time the courts pass on his case the 1914 models will be on the market."

The lawyer had a somewhat difficult witness, and finally asked if he was acquainted with any of the men on the jury.

"Yes, sir," replied the witness; "more than half of them."

"Are you willing to swear that you know more than half of them?" demanded the lawyer.

"Why, if it comes to that, I'm willing to swear that I know more than all of them put together."—Milwaukee Journal.

A colored woman of Alexandria was on trial before a magistrate, charged with inhuman treatment of her offspring. Evidence was clear that the woman had severely beaten the youngster, aged nine years, who was in court to exhibit his battered condition. Before imposing sentence, his honor asked the woman whether she had anything to say. "Kin I ask yo' Honah a question?" inquired the prisoner. The judge nodded affirmatively. "Well, then yo' Honah, I'd like to ask yo' whether yo' was ever the parent of a puffectly wurthless cullud chile?"

The topic that was being talked in Washington related to the proper training of children, which reminded Congressman Oscar Calloway, of Texas, of an incident that occurred in one of the small towns in his state.

For the fifth time, the Congressman said, a colored boy was arrested on a charge of appropriating chickens, and the magistrate decided to try an appeal to the lad's father.

"Look here, Rastus," said the magistrate, when the father appeared in court, "this is the fifth time that your son Ebenezer has been in this court, and I am tired of seeing him here."

"I don't blame yo', jedge," responded the father, a little sadly. "I'se tired ob seeing him here myse'f."

"Then why don't you teach him how to act?" demanded the magistrate. "Why don't you show him the right way?"

"Say, jedge," earnestly replied the father, "I hab done gone an' show dat boy de right way a dozen times, but somehow he allus git caught wid de chickens on him."—Exchange.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assignments for Benefit of Creditors**—Prior Liens.—Neither an assignee for the benefit of creditors nor the creditors are purchasers for a valuable consideration without notice as against prior equitable liens unless some consideration passed at the time of the assignment.—Ross v. Hodges, Ark., 157 S. W. 391.

2. **Attorney and Client**—Abandoning Case.—That defendant failed on several occasions to appear when her case was called and did not furnish her counsel with a list of witnesses, and failed to appear for trial, did not warrant her counsel in abandoning her defense without having previously given her timely notice of his intention so to do.—Brown v. Green, La., 62 So. 154.

3.——Summary Proceeding.—An attorney may be compelled in a summary proceeding to pay over to his client money received as the result of litigation.—Landro v. Great Northern Ry. Co., Minn., 141 N. W. 1103.

4. **Bankruptcy**—Assets.—Shares of stock in a certain corporation indorsed in blank and in the possession of a bankrupt firm of stock brokers in an amount greater than should be on hand for a customer for whom shares had been bought to be paid for in full, there being a credit balance with the firm in the customer's favor sufficient for such payment, are not, up to the amount of such purchase, a part of the bankrupt estate, but should be turned over to the customer.—Gorman v. Littlefield, 33 Sup. Ct. Rep. 690.

5.——Contempt.—A court of bankruptcy is without authority to make an order adjudging a bankrupt guilty of contempt for failure to obey an order of a referee requiring him to turn over property or money of the estate to his trustee, except on clear and convincing proof that he has present possession or control of the property or money and the ability to comply with the order.—Stuart v. Reynolds, C. C. A., 204 Fed. 709.

6.——Corporation.—Directors of a trust company, being liable to stockholders and creditors for any damage accruing by reason of their negligence, where the assets of the corporation are insufficient to pay its liabilities, are authorized, in case of doubt on the question, to file a bill to have the corporation's assets administered in equity.—Camden v. Virginia Safe Deposit & Trust Corporation, Va., 78 S. E. 596.

7.——Discharge.—Since the amendment of Bankr. Act July 1, 1898, § 47a (2), by Act June 25, 1910, § 8, giving a trustee the rights and remedies of a judgment creditor, a judgment creditor of the bankrupt is not entitled to have his discharge postponed to await a suit to recover surplus income in trust, since the trustee may maintain the suit for all creditors.—In re Morris, C. C. A., 204 Fed. 770.

8.——Estoppel.—After the trustee in bankruptcy has asserted, under the sanction of the court with the assent of a debtor to the bankrupt estate, the power to take legal possession of the debtor's stock which he had agreed to hold as security for the debt, it is too late for the creditors of the bankrupt under an agreement with such debtor thereafter made to raise the question whether the original agreement between the debtor and the bankrupt was ineffective to operate as a lien as to creditors for want of delivery.—Merchants' Nat. Bank of the City of New York v. Sexton, 33 Sup. Ct. Rep. 725.

9.——Insurance.—An insurance policy having no surrender value at the time of adjudication held not assets of the estate on the death of the bankrupt before settlement of the estate and before any cash surrender value had been ascertained.—Sanders v. Aetna Life Ins. Co., S. C., 78 S. E. 532.

10.——Partnership.—An individual partner not adjudged a bankrupt may be required to turn over his separate estate to the trustee of the firm in bankruptcy, where the partnership and individual estate was not enough to pay the partnership debts, where the partner had not objected that he should have been put into bankruptcy, and where assuming that the case is within Bankrupt Act July 1, 1898, § 5h, providing that the partnership property may be administered by the partners not adjudged bankrupt, such partner has never objected to the administration of the firm property by the trustee.—Francis v. McNeal, 33 Sup Ct. Rep. 701.

12.——Practice.—In a proceeding to superintend and revise in matter of law the proceedings of a court of bankruptcy, the court cannot review findings of fact upon which the order of the lower court is based.—Stuart v. Reynolds, C. C. A., 204 Fed. 709.

13.——Taxes.—Bankr. Act 1898, § 64a, requiring payment of taxes before dividends, does not require the court to order taxes due a county to be paid before costs of administration, where they may be collected from mortgaged property.—In re Oxley, U. S. D. C., 204 Fed. 826.

14. **Banks and Banking**—Insolvency.—Where a bank director, knowing of its insolvent condition, by his inaction permits or assents to the

taking of deposits, he is guilty of a violation of the statute prohibiting the acceptance of deposits by an insolvent bank.—State v. Buhler, La., 62 So. 145.

15. **Bills and Notes**—Married Woman.—In an action against a married woman on a note, the burden is upon her to establish the truth of her special pleas that the note was given in settlement of her husband's debt, and that the consideration has wholly failed; and the fact that the evidence on these defenses is evenly balanced does not entitle her to prevail.—Copeland v. McClelland, Ga., 78 S. E. 479.

16.——Negotiability.—An instrument in the form of a note, promising to pay to the estate of S. upon her death a certain sum, was not negotiable, being payable neither to order nor bearer, as required by Negotiable Instruments Law.—Kerr v. Smith, 142 N. Y. Supp. 57.

17. **Burglary**—Elements of.—Neither larceny nor the intent to steal is an essential element in the crime of burglary.—Jones v. State, Ga., 78 S. E. 474.

18. **Cancellation of Instruments**—Fraud.—That a broker's exclusive employment contract was made without present consideration is not ground for its cancellation by a court of equity, in the absence of fraud or wrong in its procurement.—Witt v. Sims, Ga., 78 S. E. 467.

19.——Tender.—In a suit to cancel deeds to lands for fraud, where it is alleged that defendant had sold a part of the lands for a sum largely in excess of the entire purchase price paid to complainant, which sum it seeks to recover, less such purchase price, an offer in the bill to return the price is not necessary.—Board of Levee Com'rs of Tensas Basin Levee Dist. v. Tensas Delta Land Co., C. C. A., 204 Fed. 736.

20. **Carriers of Goods**—Bill of Lading.—Under a bill of lading providing that the carrier would not be liable for any fault of the shipper or discrepancy in weight, it was not liable to the transferee of the shipper's draft with bill of lading attached for the amount overpaid on account of such discrepancy.—Missouri, K. & T. Ry. Co. v. Watson, Tex., 157 S. W. 438.

21.——Burden of Proof.—In an action for failure to deliver goods, the consignee has the burden of proving that he was the owner and entitled to possession of the goods.—Coleman v. New York, N. H. & H. R. Co., Mass., 102 N. E. 92.

22.——Consignee.—While presumptively the consignee of goods is the owner thereof, the presumption is not conclusive, since he may not be so in fact.—Pennsylvania R. Co. v. Titus, 142 N. Y. Supp. 43.

23. **Carriers of Live Stock**—Twenty-Eight Hours Law.—The twenty-eight hour act is for the prevention of cruelty to animals, and is not primarily for the benefit of shippers of live stock, but is restrictive of their rights, and cannot be waived by them, except in the manner and upon the contingencies provided in the act.—Cleveland, C., C. & St. L. Ry. Co. v. Hayes, Ind., 102 N. E. 34.

24. **Carriers of Passengers**—Twenty-Eight Hour Law.—In an action by the government against an interstate carrier for violation of the Twenty-Eight Hour Law, mere proof warranting a conclusion that the carrier's employees negligently, as distinguished from "willfully" and "intentionally," omitted to feed and water certain sheep, in transportation, during the rest period, was insufficient to subject the carrier to a penalty.—United States v. Lehigh Valley R. Co., C. C. A., 204 Fed. 705.

25. **Chattel Mortgages**—Money Rule.—On a money rule against a sheriff, contesting creditors could attack, on the ground of illegal and immoral consideration, the chattel mortgage held by the movant and under which the sale was had and from which the fund in the sheriff's hand originated; and it was immaterial if the fund belonged to a firm, especially where the firm and its members were insolvent.—Continental Fertilizer Co. v. J. F. Madden & Sons, Ga., 78 S. E. 460.

26. **Commerce**—Congressional Inaction.—Congressional inaction leaves each state free to establish maximum intrastate rates for interstate carriers, which are reasonable in themselves.—Simpson v. Shepard, 33 Sup. Ct. Rep. 729.

27.——Employee.—An employee of an interstate railway carrier, killed while carrying material to repair a bridge used in both interstate and intrastate commerce, was employed in interstate commerce within Employer's Liability Act, April 22, 1908.—Martin Pedersen v. Delaware, Lackawanna & Western Ry. Co., 33 Sup. Ct. Rep. 648.

28.——Taxation.—Pennsylvania coal shipped by its owner to its own order at a New Jersey tide-water port, where if no vessels were available for its transportation it was dumped into a storage yard to be transferred to vessels as occasion required, held subject to local taxation while in such yard, though it was destined ultimately for ports in other states.—Susquehanna Coal Co. v. City of South Amboy, 33 Sup. Ct. Rep. 712.

29.——Webb Liquor Act.—The Webb Act does not interfere with state policy, but merely provides that the enforcement of a state statute will not be interfered with by the interstate commerce clause.—Atkinson v. Southern Express Co., S. Car., 78 S. E. 516.

30. **Common Carriers**—Test of.—The fact that private pipe lines may be laid across, or in some instances along, public highways, with the consent of the local authorities, or along the right of way of interstate railroads, with the consent of the railroad companies, does not impress upon them any obligation to become common carriers.—Prairie Oil & Gas Co. v. United States, U. S. Com. Ct., 204 Fed. 798.

31. **Constitutional Law**—Due Process of Law.—Subjecting a water company whose franchise has expired to the alternative of accepting an inadequate price or having the value of the plant ruinously impaired by the construction of a municipal plant does not take the property without due process of law, contrary to Const. U. S. Amend. 14, where the city is under no legal obligation to renew the franchise or to purchase the plant.—City and County of Denver v. New York Trust Co., 33 Sup. Ct. Rep. 657.

32.——Due Process of Law.—The property of a street railway company whose franchise to operate has expired is not taken without due process of law by requiring it to remove its tracks from the streets within a reasonable

time.—Detroit United Ry. v. City of Detroit, 33 Sup. Ct. Rep. 697.

33. **Corporations**—Promoter.—Where plaintiffs and defendant were jointly interested in the formation of a corporation, defendant, who signed an agreement for the lease of a machine from plaintiffs for the corporation when formed, is not liable as a promoter.—Belding v. Vaughan, Ark., 157 S. W. 400.

34.——Rescission.—Mere delay of a purchaser of corporate stock to rescind after the discovery of the fraud inducing the purchase resulting from reasonable expectation on his part that the corporation will grant him proper relief will not estop him from rescinding.—White v. American Nat. Life Ins. Co., Va., 78 S. E. 582.

35. **Courts**—Jurisdiction.—Act Cong. Feb. 24, 1905, giving to the federal courts exclusive jurisdiction over actions on bonds given by government contractors to secure subcontractors and materialmen, does not affect an action in a state court by a subcontractor whose rights accrued under a bond and contract executed prior to its passage, though part of the labor and material was furnished after its passage.—United States v. Schofield Co., Pa., 87 Atl. 14.

36.——Stare Decisis.—The doctrine of stare decisis does not operate upon inconsistent principles adjudicated by the same court, nor cover a principle not constantly acquiesced in by the same court.—In re Gedney's Will, 142 N. Y. Supp. 157.

37. **Covenants**—Breach of.—Though on a total breach of covenant of warranty the purchaser may generally recover the whole consideration paid, yet where there is a partial breach he may recover pro tanto only, and, where there is a failure of title to one of several tracts of land conveyed by the same deed, the grantee may recover the consideration paid for the particular tract.—Hanlon v. Conrad-Krammerer Glue Co., Ind., 102 N. E. 48.

38.——Breach of.—Where a trustee in executing a deed containing a warranty of title intended to bind himself individually, his estate was liable after his death for damages arising from breach of covenant.—Colclough v. Briggs, S. Car., 78 S. E. 530.

39. **Criminal Law**—De Facto Corporation.—Proof that defendant was a de facto corporation by showing that it acted as such and was accepted in the community as a corporation under the name alleged held sufficient to show its corporate existence in a criminal proceeding.—Louisville & N. R. Co. v. Commonwealth, Ky., 157 S. W. 369.

40.——Impeachment.—The Supreme Court will take judicial notice of the fact that it is much easier to prove good reputation of a party or witness than it is to impeach his reputation.—State v. Reed, Mo., 157 S. W. 316.

41. **Damages**—Instructions.—The court should charge that the amount of damages is left to "the enlightened consciences of impartial jurors," and not to "the sound discretion of impartial jurors."—City of Rome v. Harris, Ga., 78 S. E. 475.

42.——Mortuary Tables.—In actions for personal injuries, life tables are admissible in evidence, although possibly of little value, even though the injuries are of such a nature as probably to shorten plaintiff's life.—Scott v. Chicago, R. I. & P. Ry. Co., Iowa, 141 N. W. 1065.

43.——Proximate Cause.—Where a person is injured by defendant's negligence, defendant is liable for the injuries proximately resulting, even though aggravated by an accidental, improper, but honest treatment on the part of plaintiff's physician, provided plaintiff used due care in selecting a reputable physician.—Gray v. Boston Elevated Ry. Co., Mass., 102 N. E. 71.

44.——Punitive.—In an action to recover actual and punitive damages for the removal of plaintiff's telephone, evidence of defendant's financial condition was competent.—Carmichael v. Southern Bell Telephone & Telegraph Co., N. C., 78 S. E. 507.

45. **Death**—Employers' Liability Act.—In an action under Employers' Liability Act, enabling a personal representative to sue for injury to a servant resulting in death, the damages are compensatory only, and not punitive.—Citizens' Light, Heat & Power Co. v. Lee, Ala., 62 So. 199.

46.——Limitation on Actions.—Where a statutory right of action is given which did not exist at common law, and the statute giving the same also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right of action as well as upon the remedy.—Anthony v. St. Louis, I. M. & S. Ry. Co., Ark., 157 S. W. 394.

47. **Deeds**—Correction.—A deed made to correct a prior deed relates back to the time of the prior deed and takes the place of it, and the consideration of the prior deed is the consideration for the subsequent deed.—Hanlon v. Conrad-Krammerer Glue Co., Ind., 102 N. E. 48.

48.——Delivery.—A deed is not effective unless delivered with the grantor's intention that it shall become effective, and a deed obtained through the fraud of the grantee without the consent of the grantor is insufficient.—Spotts v. Whitaker, Tex., 157 S. W. 422.

49.——Estoppel.—Grantees in a deed, set aside on the ground of their fraud, may not set up a mortgage which they acquired through their active fraud in representing it to be an invalid incumbrance, and which, if valid, would be merged by being assigned to one of the grantees.—Murphy v. Robinson, Mass., 102 N. E. 75.

50. **Divorce**—Preliminary Examination.—In an action for divorce, where the husband denies the allegations of the complaint, he cannot be examined before trial concerning his property and income.—Reynolds v. Reynolds, 142 N. Y. Supp. 1.

51. **Easements**—Damages.—The measure of damages recoverable against the receiver of a railway company for closing a private roadway is the difference in the market of the landowner's property with the roadway opened and with it closed.—Atkinson v. Kreis, Ga., 78 S. E. 465.

52. **Electricity**—Contract.—Where a contract for the sale and delivery of electric current at a specified price makes no mention of loss in transmission, such loss must fall upon the seller.—Wherland Electric Co. v. Burmeister, Minn., 141 N. W. 1117.

53. **Evidence**—Credibility.—The credibility of a witness, whether interested or not, is a question for the jury, and therefore statements by

him even against his own interest are not conclusive admissions.—Meyers v. Chicago, B. & Q. Ry. Co., Mo., 157 S. W. 362.

54.——Declarations of Third Party.—Declarations of a person with whom plaintiff was said to have had illicit intercourse, made to others than defendant, are not admissible in mitigation of damages.—Webb v. Gray, Ala., 62 So. 194.

55.——Presumption.—The relation of principal and agent once established presumptively continues in the absence of proof to the contrary.—White v. American Nat. Life Ins. Co., Va., 78 S. E. 582.

56.——Public Auction.—The price at which goods sell at a public auction is some evidence of their value.—Navarre Hotel & Importation Co. v. American Appraisal Co., 142 N. Y. Supp. 89.

57. **Fraudulent Conveyances**—Notice to Grantee.—A conveyance cannot be attacked as fraudulent, notwithstanding a fraudulent purpose of the grantor, in the absence of knowledge thereof actual or constructive by the grantee.—Tenold v. Klimesh, Iowa, 141 N. W. 1046.

58. **Habeas Corpus**—Void Sentence.—A sentence imposed in excess of what was authorized by statute is not void as to the excess, so as to jutify relief by habeas corpus, where under the local practice the sentence was subject to change or reversal in a higher court and the accused subject to resentence.—Ex parte Spencer, 33 Sup. Ct. Rep. 709.

59. **Homicide**—Dying Declarations.—In a homicide case, where deceased's dying declarations were admitted, defendant has the right to attack deceased's reputation with general evidence that his reputation was bad.—State v. Reed, Mo., 157 S. W. 316.

60.——Dying Declarations.—That deceased, before making her statement, said she did not know whether she would get better, did not render such statement inadmissible as a dying declaration, where she was in extremis in fact, and immediately afterward, and before making the statement, said she believed she was going to die.—State v. Mueller, Minn., 141 N. W. 1113.

61.——Insulting Words.—Insulting words and conduct toward the wife of defendant may be adequate cause to reduce homicide to manslaughter.—Reagan v. State, Tex., 157 S. W. 483.

62.——Intent.—One who willfully or wantonly runs one locomotive against another locomotive with knowledge that the act will probably result in the death of a particular person is guilty, when death ensues, of taking the life of such person, though the act is not necessarily murder.—Vessel v. Seaboard Air Line Ry. Co., Ala., 62 So. 180.

63.——Proximate Cause.—One who unlawfully inflicts a dangerous wound upon another is liable for his death, whether it be direct or occasioned by a surgical operation made necessary by the wound and performed with reasonable skill.—Odeneal v. State, Tenn., 157 S. W. 419.

64.——Reduction of Degree.—Defendant, who had been asked by his mother to protect her against deceased, her husband, from whom she was separated, and whom she had requested to stay away from her home, did not, by forbidding deceased to enter her home, when he was attempting to do so, provoke the difficulty so as to place himself beyond the law of self-defense.—State v. Sinclair, Mo., 157 S. W. 339.

65.——Threats.—That decedent, who was the husband of accused's sister, had made threats against the sister and stolen their children away from her and put them in a house of prostitution, would not reduce an otherwise inexcusable killing below the grade of murder.—Smith v. State, Ala., 62 So. 184.

66. **Husband and Wife**—Alienation of Affections.—A person who gives a husband advice, with an honest and friendly desire to assist him, even though it leads to his separation from his wife, and may turn out not to have been the best advice that could have been given, is not liable to the wife, in the absence of malice.—Geromini v. Brunelle, Mass., 102 N. E. 67.

67.——Separate Maintenance.—In an action for separate maintenance, the allowance of temporary alimony, including attorney's fees, is within the sound discretion of the trial court.—Keefer v. Keefer, Ga., 78 S. E. 462.

68. **Injunction**—Wrongful Issuance.—Damages for the wrongful issuance of a writ of injunction are properly the subject-matter of a separate action.—Tensas Delta Land Co. v. Fleischer, La., 62 So. 129.

69. **Insurance**—Broker.—An insurance broker acting within the scope of his authority, is the agent of the company from which he secures insurance, and his knowledge relating to the risk is binding on the company, though not communicated to it.—Western Ins. Co. v. Ashby, Iowa, 102 N. E. 45.

70.——Forfeiture.—The mortgaging of insured personalty is an increase of the risk within a policy clause making the insurance void if the subject of insurance is personalty and becomes incumbered by a chattel mortgage.—Security Ins. Co. v. Laird, Ala., 62 So. 182.

71.——Insurable Interest.—Neither the estate of a member nor his next of kin has any interest in the death benefit fund of a mutual benefit association, where the beneficiary has no insurable interest in his life.—Smith's Adm'r v. Hatke, Va., 78 S. E. 584.

72.——Payment of Premiums.—It was unnecessary for insured to tender the weekly premiums after the insurance company's agents had taken up his policy and notified him that they would receive no further premiums.—Pilgrims' Health & Life Ins. Co. v. Scott, Ga., 78 S. E. 469.

73.——Stockholder.—An agent authorized to issue tornado insurance policies cannot bind his principal by issuing a policy on property of a corporation of which he is a stockholder.—Riverside Development Co. v. Hartford Fire Ins. Co., Miss., 62 So. 169.

74. **Intoxicating Liquors**—Burder of Proof.—Where the state introduced evidence that accused was given money and went away and returned with whiskey, which he delivered to the state's witness, the burden was on accused to show, in support of his defense, that he acted as agent for the purchaser, and how he obtained such liquor.—Fletcher v. State, Ga., 78 S. E. 478.

75. **Judges**—Consent of Parties.—Consent of the parties cannot qualify a judge who disposed of a case in the first instance to sit in the Circuit Court of Appeals, contrary to the proviso of Judicial Code, § 120, to review his own action.—William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co., 33 Sup. Ct. Rep. 722.

76. **Landlord and Tenant**—Common Use by Tenants.—A landlord is liable for damages to tenant by defects in that part of the premises retained by the landlord only when he had notice of the defects, and constructive notice cannot be predicated upon the existence of a defect not discoverable by inspection.—Cohen v. Cotheal, 142 N. Y. Supp. 99.

77.——Repairs.—Where a lessor fails to make needed repairs which are slight, the lessee should make them and take their cost out of the rent.—Torres v. Starke, La., 62 So. 137.

78. **Libel and Slander**—Breach of Trust.—To falsely charge one with grafting is to falsely charge him with the statutory crime of breach of trust with a fraudulent intent.—Gill v. Ruggles, S. C., 78 S. E. 536.

79.——Candidate for Office.—A publication charging that an attorney engaged in criminal practice could have no proper motive in aspiring to the office of district attorney, and that his associates and sponsors were remnants of the most degraded regime the city ever knew, is not libelous per se a charging such attorney with the commission of crime.—Walsh v. Pulitzer Pub. Co., Mo., 157 S. W. 326.

80.——Mitigation of Damages.—Letters shown to the defendant as the letters of the plaintiff, but not proved to be such, are admissible in mitigation of damages to show his reasonable belief of the truth of the statements made by him.—Webb v. Gray, Ala., 62 So. 194.

81.——Practice.—Plaintiff in an action for libel, having pleaded the whole article, put it in evidence, and read it to the jury, could not object to proof that derogatory, though nonlibelous, statements therein were true.—Astruc v. Star Co., C. C. A., 204 Fed. 776.

82. **Marriage**—Annulment.—An infant, who marries under the age of 18 years with the written consent of her mother, but leaves her husband before she arrives at that age, is entitled to sue to annul the marriage.—Mundell v. Coster, 142 N. Y. Supp. 142.

83. **Master and Servant**—Assumption of Risk.—A servant does not assume the risk of injury from a breach of a statutory duty by the master.—Citizens' Light, Heat & Power Co. v. Lee, Ala., 62 So. 199.

84.——Hotelkeeper.—A hotelkeeper, who retains control of the stairway used by his servants and provides no other, while it is being repaired by an independent contractor, owes the duty to his servants to keep the stairway safe or properly warn them.—Foley v. J. R. Whipple Co., Mass., 102 N. E. 84.

85.——Fellow Servant.—A person consenting to aid in hauling a boiler to a sugar mill, whether a volunteer or not, is a fellow servant with the driver of the millowner's automobile during a trip taken for the purpose of doing the work.—Brooks v. Central Sainte Jeanne, 33 Sup. Ct. Rep. 700.

86.——Fellow Servant.—One who, while engaged in repairing a standing car, is injured by a moving car being negligently brought in collision with it, is within the protection of Code, § 2071, abolishing the fellow-servant rule, where the negligence occasioning the injury is in any manner connected with the use and operation of a railway.—Russell v. Chicago, R. I. & P. Ry. Co., Iowa, 141 N. W. 1077.

87.——Inexperienced Servant.—Where it appeared that plaintiff was inexperienced and that without being warned he was ordered by defendant's foreman to "hurry up" and perform dangerous work which resulted in his injury, the question of contributory negligence was for the jury.—Brown v. Armstrong & Latta Co., Pa., 87 Atl. 11.

88.——Vice-Principal.—An employee who had the full charge, control, and direction of a vessel which was being loaded, and had entire charge and direction of the work and employed and discharged the men, was a vice-principal.—Chesapeake Stevedoring Co. v. Hufnagel, Md., 87 Atl. 4.

89.——Violation of Rule.—The violation of a rule by an employee is negligence as a matter of law where such violation is the proximate cause of an accident.—Fernette v. Pere Marquette R. Co., Mich., 141 N. W. 1084.

90.——Workmen's Compensation Act.—A notice filed by a railway company, which states that it accepts the provisions of the Workmen's Compensation Act, and that the nature of the employment of its men is office and shop work, is sufficient to include all employees of the railway company, if the statute authorizes their inclusion.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Industrial Commission of Wisconsin, Wis., 141 N. W. 1119.

91. **Mortgages**—Equity.—The rule, once a mortgage always a mortgage, is elementary in equity.—Doyle v. Ringo, Ind., 102 N. E. 18.

92.——New Consideration.—Where a debt secured by a mortgage has been paid, the mortgage may not thereafter be held as security for another debt except by contract supported by a new consideration.—Ross v. Hodges, Ark., 157 S. W. 391.

93. **Municipal Corporations**—Governmental Duty.—The rule that, unless made so by statute, municipal corporations are not civilly liable to individuals for failure to perform, or neglect in performing, governmental duties is subject to the limitation that such corporation, or other governmental agency, may not establish or maintain a nuisance causing appreciable damages to property of a private owner without being liable therefor.—Hines v. City of Rocky Mount, N. C., 78 S. E. 510.

94. **Names**—Adopted Name.—In view of the fact that one may go into court under an adopted name, oral evidence is admissible to show the real party directing or controlling litigation.—Milbra v. Sloss-Sheffield Steel & Iron Co., Ala., 62 So. 176.

95. **Negligence**—Child.—A child under seven years of age cannot be guilty of contributory negligence.—Dodd v. Spartanburg Ry., Gas & Electric Co., S. C., 78 S. E. 525.

96.——Employers' Liability Act.—The direction in Employers' Liability Act, as to diminution of damages because of contributory negligence of plaintiff, means that, where the causal negligence is partly attributable to him and partly to the carrier, he shall only recover a proportional amount, bearing the same relation to the full amount that the negligence of the carrier bears to the entire negligence attributable to both.—Norfolk & W. R. Co. v. Earnest, 33 Sup. Ct. Rep. 654.

97.——Proximate Cause.—An instruction that negligence is the proximate cause of an injury which follows the negligent act, if it can be fairly said that in the absence of the alleged negligence the injury and damage would not have occurred, sufficiently defines "proximate cause."—Reed v. Rex Fuel Co., Iowa, 141 N. W. 1056.

98. **Nuisance**—Livery Stable.—While a livery stable is not a nuisance per se, it may be so

conducted as to become injurious to the health or comfort of surrounding property owners.—Hall v. Carter, Tex., 157 S. W. 461.

99.——Pleading and Proof.—A declaration which alleges a continuing nuisance does not prevent a recovery thereunder for an occasional nuisance caused in the manner alleged in the declaration.—Virginia Ry. & Power Co. v. Ferebee, Va., 78 S. E. 556.

100. **Partnership**—Survivor.—The rule applicable to merchandising partnerships is that, in the absence of an agreement therefor in the partnership articles or a statute providing for it, a surviving partner is not entitled to compensation for winding up the affairs of the partnership.—Harrah v. Dyer, Ind., 102 N. E. 14.

101. **Patents**—Sales.—Attaching a notice to a patented article that it is licensed for sale and use at a specified price, and that a purchase is an acceptance of the condition and that all rights revert to the patentee on the violation of the restriction, does not convert an unqualified sale to a mere license to use the invention.—Bauer & Cie v. O'Donnell, 33 Sup. Ct. Rep. 616.

102. **Quieting Title**—Gift.—Where a purchaser took title to land in his own name, and thereafter made a gift of it to his brother, placing him in possession, the latter is entitled to a decree vesting the title in himself.—Strauther v. Bogenshutz, Ark., 157 S. W. 406.

103. **Railroads**—Crossing.—Where a train approaches a crossing of another railroad, but no train on the latter road is approaching the crossing in dangerous proximity thereto, the trainmen may presume that an approaching train will stop before reaching the crossing.—Vessel v. Seaboard Air Line Ry. Co., Ala., 62 So. 180.

104.——Statutory Duty.—A railroad can relieve itself from liability for its failure to give statutory signals and regulate speed at crossings only by proving that the injury was caused by plaintiff's own negligence, or that by ordinary care he could have avoided the consequences of defendant's negligence; and it can mitigate its damages only by proving plaintiff's contributory negligence.—Dozier v. Central of Georgia Ry. Co., Ga., 78 S. E. 469.

105. **Rape**—Complaint.—The particular facts of the crime as related by the prosecutrix at the time of or after making complaint of the rape are not admissible, except when drawn from the complainant on cross-examination or introduced as confirmatory of her testimony after testimony has been introduced tending to impeach her.—State v. Lawhorn, Mo., 157 S. W. 344.

106.——Intent to Commit.—One who assaults a woman with intent to have intercourse with her forcibly and against her will is guilty of an assault with intent to commit rape, even though, after the assault is made, she consents to the intercourse.—Paxton v. State, Ark., 157 S. W. 396.

107. **Removal of Causes**—Fraudulent Joinder.—An averment that a resident railway employee, made a party defendant in a personal injury action brought against a nonresident railroad company by another employee, was a man of small means, and the responsibility of the railroad company was unquestioned, held not to show a fraudulent joinder to prevent removal.—Chicago, R. I. & P. R. R. Co. v. Dowell, 38 Sup. Ct. Rep. 684.

108. **Replevin**—Demand and Refusal.—Where defendant purchased property in the open market for value from a person having control thereof without notice of plaintiff's claim, a demand was necessary in order to support claim and delivery.—Harby v. Byers Lumber Co., S. C., 78 S. E. 522.

109. **Sales**—Implied Warranty.—A manufacturer does not impliedly warrant that a gasoline engine will be sufficient for the purpose for which he knows the buyer desires to use it.—Middletown Mach. Co. v. Chaffin, Ark., 157 S. W. 398.

110.——Stoppage in Transitu.—The right of stoppage in transitu is favored, and endures so long as the goods remain in the possession of the carrier as such, and until actual or constructive delivery to the consignee; a "constructive delivery" arising when the carrier has recognized the title of the consignee and has agreed to hold the goods as his agent under a new contract.—Coleman v. New York, N. H. & H. R. Co., Mass., 102 N. E. 92.

111.——Waiver.—Where a buyer of a machine kept it for about two months without asking the seller to send a man to start it, as he had agreed to do, and made no complaint that a man had not been sent, when asked thereafter to settle, the stipulation that the seller should send a man to start it was waived.—Isaacs v. McDonald, Mass., 102 N. E. 81.

112.——Warranty.—Though a provision of a contract for the sale of water power machinery that it would develop a specified horse power be regarded as a condition precedent, the buyer having received and accepted a substantial part of the machinery, the efficiency provision became a warranty.—Sanderson v. Trump Mfg. Co., Ind., 102 N. E. 2.

113.——Warranty.—Warranty in a sale of goods being a collateral contract, the burden of showing a breach thereof is on the buyer suing for breach of warranty either directly or by way of set-off or counterclaim.—Sanderson v. Trump Mfg. Co., Ind., 102 N. E. 2.

114. **Sunday**—Games.—A public baseball game between professional teams, conducted under the auspices of a league of baseball for profit, is within Penal Law, § 2145, prohibiting public sports and shows on Sunday, and it is immaterial whether an admission fee is charged.—Greater Newburgh Amusement Co. v. Sayer, 142 N. Y. Supp. 69.

115. **Trade Marks and Trade Names**—Unfair Competition.—Where words not subject of valid trade-mark have by use acquired such a secondary meaning as to indicate in the trade that the goods to which they are applied are made by a particular manufacturer, use thereof by another on similar goods, so as to be likely to deceive purchasers, will be restrained as unfair competition.—C. A. Briggs Co. v. National Wafer Co., Mass., 102 N. E. 87.

116. **Trover and Conversion**—Notice.—Where one purchases personal property with knowledge that the seller has no title, his retention of the property as against the true owner is a conversion.—Hall v. G. J. Roehr & Co., Ga., 78 S. E. 481.

117. **Trusts**—Conditions.—A testator may so dispose of his property that it may be enjoyed by the recipient without liability to the latter's creditors.—Shelton v. King, 33 Sup. Ct. Rep. 686.

118.——Laches.—A delay of more than 10 years by a minority stockholder before commencing suit against a reorganization committee to enforce an alleged trust in their favor held to constitute such laches as to debar complainant from equitable relief, there being no evidence of fraud.—C. H. Venner Co. v. Central Trust Co. of New York, C. C. A., 204 Fed. 779.

119. **Vendor and Purchaser**—Bond for Title.—The title of an obligee in a bond for title is equitable, and subsequent purchasers and incumbrances take the same charged with all the defects to which it would be subject in the hands of the obligee.—Spotts v. Whitaker, Tex., 157 S. W. 422.

120. **Wills**—Foreign Will.—The validity of a foreign will disposing of realty and personalty in the state, and admitted to probate in the state so far as it disposes of real estate, is not adjudicated by the admission to probate and may be raised on final distribution.—Cornell v. Burr, S. D., 141 N. W. 1081.

121.——Signing.—Under Code 1906, § 5078, providing a will must be signed, without stating where, it is unnecessary that the signing be at the end.—Armstrong v. Walton, Miss., 62 So. 173.

122.——Testamentary Capacity.—One who has sufficient capacity to understand the nature of the business in which he is engaged in the execution of his will to comprehend generally the extent of his estate and to recollect the objects of his bounty and to assent to the provisions of the will has testamentary capacity.—Huff v. Welch, Va., 78 S. E. 573.